

Hawaiian Gazette.

VOL. XL. NO. 16

HONOLULU, T. H., FRIDAY, FEBRUARY 24, 1905.—SEMI-WEEKLY,

WHOLE 2671

AN INEQUITABLE CAUSE THROWN OUT OF COURT

**Argument of Counsel Cut Short—Supreme Court
Summarily Dismisses Dee vs. Smith.
Clean Hands Not Shown.**

Indignation was evident in the tones of the Supreme Court justices yesterday afternoon, when one by one they gave their reasons for summarily throwing the equity suit of Lawrence H. Dee against W. H. Smith out of court. As indicated by the remarks of the Chief Justice, the court regarded any deliberation over its decision a waste of time. J. A. Magoon and J. Lightfoot appeared for the plaintiff, and S. M. Ballou for the defendant.

Mr. Lightfoot was making the closing argument for Dee when, at 2:30 o'clock, Chief Justice Frear with a gesture signified that time was up. The speaker asked for just a minute longer, but was informed it was not necessary. Mr. Lightfoot had just been saying that Justice Wilder drew a certain deed, and that the defendant's counsel had tried "to drag the ermine from the bench and besmire it in the mud."

Mr. Ballou, in reply to this, only remarked that it was not in evidence that Mr. Wilder drew that deed.

The official record of the decision orally rendered by the members of the court appears below. A history of the case, taken from the pleadings and Judge Gear's decree now affirmed, will show the full bearing of the decision.

HISTORY OF THE CASE.

"Lawrence H. Dee vs. Wm. H. Smith, bill to remove cloud from title," the case is entitled. It arises from the celebrated Kamalo Sugar Co. case, in which Judge Humphreys made a decree on June 9, 1902, awarding Harvey R. Hitchcock and others (including Dee) \$39,781.88 against Frank Hustace, J. J. Egan and Frank H. Foster.

Hustace paid into court his full one-third of the amount of judgment. Later he made conveyances of property to his brother, Charles Hustace, Jr., and J. F. Morgan—a fact worth noting here only because, in the case of Dee vs. Smith, these conveyances were introduced as collateral evidence to show that the conveyance by Hustace to Smith there attacked was part of a scheme to defraud creditors.

ADVICE TO HUSTACE.

Some time after the payment by Hustace of his share of the Kamalo judgment, Dee went to Hustace and, saying to him it "would be a shame" that he (Hustace) should be compelled to pay the entire judgment, advised him to make conveyances of his property so as to avoid the levying of executions thereon. When this was done, it was represented, Hustace could join with Dee and the other plaintiffs in the Kamalo case to bring suits against Egan and Foster. Egan's conveyance of his property was to be attacked as fraudulent.

Attorney Magoon also urged Hustace to the same course and went with him and Dee to the law office of Robertson & Wilder to enlist that firm in the scheme. "Both Dee and his attorney, Mr. Magoon," as Judge Gear's decree related, "urged Mr. Hustace to convey away his property so that the Kamalo Sugar Co., represented by both Mr. Dee and Mr. Magoon, could proceed against the property of Messrs. Foster and Egan, it being their claim that no proceedings could be taken against either Foster or Egan until an execution against Mr. Hustace had been returned nulla bona."

Mr. Robertson refused to have anything to do with Mr. Magoon's proposition, he having defended Egan and Foster as well as Hustace in the Kamalo litigation. In the hearing before Gear, Magoon said part of his proposition explained in Robertson & Wilder's office was that Hustace was to give a bond for the entire judgment, which should be operative in the event that nothing could be got out of Foster and Egan. Robertson denied having heard any such thing from Magoon. As shown at the hearing, the proposed bond would have been fraudulent as against other creditors of Hustace than the Kamalo complainants.

THE CLASHING DEEDS.

Three months after the decree by Judge Humphreys already mentioned, Hustace conveyed to W. H. Smith a piece of land containing 13 acres on the northwest side of Nuuanu Valley, the consideration named in the deed being one dollar. The same land was levied upon, under execution on the Kamalo judgment, and sold at auction in front of the police station on January 8, 1903. L. H. Dee was the purchaser for \$1000 and received a deed of the property from A. M. Brown, High Sheriff of the Territory.

SMITH'S PURCHASE.

Smith, in his answer to Dee's complaint, gives an explanation of his purchase of the land from Hustace. He had taken up a note of Hustace to the late M. Louison for \$10,000, which had been secured by shares of Oahu and Oookala sugar stocks. The Louison executors were about to foreclose on this collateral security, the market value of which at that time was much below par. It would not, at forced sale, have brought anything like the amount of the note and the deficiency would have been entered against Hustace. Smith paid the note in consideration of receiving, besides the collateral already mentioned, a deed of the Nuuanu Valley property in question and this, again, with the condition attached that the land would be conveyed back to Hustace when he repaid the loan of \$10,000. After a time Smith found it necessary to sell the Oookala stock, when he credited the net proceeds to Hustace on the loan. Smith had no knowledge, until Dee's suit was brought against him, that Hustace was under any liability for the Kamalo judgment.

The conclusion of Smith's answer was an offer to Dee to convey the land to him if he paid the balance due on his (Smith's) loan to Hustace.

Neither Judge Gear nor the Supreme Court could find any fraud

PRATT TO QUALIFY AS NEW POSTMASTER BEFORE COMING BACK

(Special Cable to the Advertiser.)

WASHINGTON, Feb. 23.—J. G. Pratt has been confirmed as postmaster of Honolulu. He intends to qualify here. WALKER.

THE STRIKE IN POLAND IS MARKED BY VIOLENCE

Russian Government Perplexed by the Railroad Situation—More Authors Are Put in Prison.

WARSAW, Feb. 24.—The strike is worse and is extending over all railway lines. The strikers are resorting to violence and the Government is puzzled over how to proceed.

WRITERS IN CUSTODY.

MOSCOW, Feb. 24.—Andrieff and two other writers have been arrested.

AFTERNOON REPORT.

MOSCOW, Feb. 23.—The funeral of the Grand Duke Sergius, killed by an assassin, took place today from the Chandoff monastery. The ceremony was attended by the leaders of the nation and was very impressive.

WARSAW, Feb. 23.—The workmen have struck in all the factories of the Czarinskowska district and disturbances have arisen. Employees of the Lodz Kaluska railroad have struck.

In the conveyance by Hustace to Smith, Justice Hartwell held it was "in absolutely good faith."

AS TO CLEAN HANDS.

Referring to the bond by Hustace covering the whole Kamalo judgment, which Mr. Magoon said he proposed, the decree asked—in the event of its being executed—what would become of the other creditors, for instance the Louison estate with its claim of \$10,000, and denounced the proposition as fraudulent in equity. The decree also commented on the attempt of the plaintiff and his attorney to prove fraud by a deed the making of which they had counseled and advised. This procedure the Supreme Court also strongly denounces, the Chief Justice quoting the maxim that he who seeks equity must do equity—must come into court with clean hands.

Another thing severely condemned in the decree was the appearance of Mr. Magoon to prosecute a charge of fraud against Mr. Hustace after the latter had paid him a fee of \$150 to bring a suit against Egan and Foster, which he never brought, the court regarding this fee as a retainer to protect Hustace's interests.

DECISION.

The Chief Justice: In this case the court deems it unnecessary to take further time for consideration. The court is of the opinion that the decree appealed from should be affirmed in so far as it dismisses the bill and denies the relief prayed for. I notice that in the decree there are some other provisions which have not been touched upon by counsel in their argument and possibly those provisions were not properly inserted in the decree under this bill. As to that we need to express no opinion—simply the decree is affirmed as far as it dismissed the bill and denied the relief prayed for.

There are other questions, some suggested by counsel, but really not argued, and some suggested by the pleadings in the case, which I will not go into.

The three main points argued by counsel seem to be those of election, and the innocence of the defendant in the transaction, and the matter of the estoppel, and the view that I take of the case, without committing my associates for all I may say—I think it would be unnecessary for me to go into those first two questions, the question of election and the question of the innocence of the defendant in the transaction—I base my opinion upon the other ground, that of estoppel.

The plaintiff certainly seems to have been an aider and an abettor and instigator of Mr. Hustace's transactions and he comes into court without clean hands, and I do not see how he can ask a court of equity to set aside that which he has connived at and advised and instigated.

Mr. Justice Hartwell: When the plaintiff's attorney had closed his opening remarks I did not see how the bill could possibly be sustained, and that opinion was fixed still more clearly in my mind after his closing remarks. In the first place it seems to me—and here I am not trying to express the views of my colleagues on the bench, merely my own—that the bill is not so framed as to hold the defendant as a fraudulent grantee. Saying that this conveyance is voluntary and without consideration does not make it so. A copy of the conveyance is attached and made a part

(Continued on Page 5)

BIG BATTLE IN PROSPECT

**St. Petersburg Expects to Hear
Soon of Stirring Events
on Fighting Line.**

(ASSOCIATED PRESS CABLEGRAMS.)

ST. PETERSBURG, Feb. 24.—The absence of dispatches from General Kuropatkin is interpreted to mean that great events are impending.

NORTH SEA COMPROMISE.

PARIS, Feb. 24.—It is stated that the decision in the North Sea case will be announced Saturday. It is a compromise.

THE RUSSIANS PLEASED.

ST. PETERSBURG, Feb. 24.—The news from Paris about the findings of the North Sea Commission has been received with quiet exultation.

RUSSIAN WARSHIPS SEEN.

ADEN, Feb. 24.—Five Russian warships have been sighted off Nogdishu.

SITUATION GRAVE.

ST. PETERSBURG, Feb. 22.—The railway strike is worse and there is much uneasiness here about the situation in Poland and along the Austrian border, where disturbances are increasing.

ST. PETERSBURG, Feb. 23.—The Grand Dukes will depart for Moscow tomorrow to attend the funeral of Grand Duke Sergius.

CZAR SUSTAINS KUROPATKIN.

ST. PETERSBURG, Feb. 22.—The Czar has ordered Gen. Gripenberg to return to his post, thus sustaining Kuropatkin.

ST. PETERSBURG, Feb. 22.—It is rumored that the Czar is considering terms of peace.

GRAVE SITUATION IN CAUCASUS.

It is reported that racial disorders have developed in the Caucasus. The Armenians have revolted in one district and have imprisoned the officials.

RAILWAY STRIKES SPREADING.

WARSAW, Feb. 23.—The railway to Vienna is tied up by the strikes. It is probable that the other lines to the Austrian and German frontiers will be involved.

CZAR YIELDING TO STRIKERS.

BERLIN, Feb. 22.—The Russian Emperor has ordered that the demands of the striking railroad employees be granted.

AFTERNOON REPORT.

BERLIN, Germany, Feb. 23.—The Emperor of Russia has decided to continue the war with Japan with the utmost energy.

The domestic situation is reported to be within the control of the authorities.

JAPAN STILL PREPARING.

TOKIO, Feb. 23.—A fourth domestic loan of one hundred millions has been decided upon by the government. The new fleet of destroyers will be completed in a year.

AT THE SEAT OF WAR.

TIENTSIN, Feb. 22.—Russian cavalry raiders have damaged the railroad in Manchuria, by which Oyama receives supplies for his forces.

TOKIO, Feb. 22.—The Russian forces are continuing the bombardment of Oyama's position.

MORE JAP TORPEDO BOATS.

TOKIO, Feb. 22.—The Government has ordered 25 torpedo boats.

RUMORS OF PEACE.

BERLIN, Feb. 22.—Much credence is given in official circles here to the peace reports from Russia.

ST. PETERSBURG, Feb. 22.—It is declared that there has been no move made looking to the termination of the war with Japan.

LONDON, Feb. 22.—It is understood that Russia is willing to make peace on the conditions that Korea shall pass under Japanese suzerainty, Port Arthur be ceded to Japan, Vladivostok be made a neutral port, the Eastern Chinese railway be made neutral under international administration and Manchuria as far north as Harbin be restored to China. The question of indemnity is as yet undetermined.

BERLIN, Feb. 22.—The Armenians and Circassians of the Caucasus have revolted and seized the arms of the Russians.

VIOLENCE AT BAKU.

BAKU, Feb. 22.—The strikers have pillaged shops and burned houses.

WASHINGTON, Feb. 23.—A battalion of infantry from the Porto Rican provisional force will participate in the inaugural ceremonies.

BIRMINGHAM, Ala., Feb. 24.—Ninety-two bodies have been recovered from the exploded mine.

CHICAGO, Feb. 24.—Hoch, the modern Bluebeard, has been held without bail.

WASHINGTON, Feb. 24.—The House has passed the River and Harbor bill. It carries \$17,000,000.

COPENHAGEN, Feb. 24.—A whipping post bill has been introduced in the Rigsdag.